IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3844 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAHENDRASINH H. JADEJA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3844 of 1990

MR MR ANAND, SR. COUNSEL WITH MR. A.M. RAVAL, for Petitioners No. 1-7

MR. S.N. SHELAT, ADVOCATE GENERAL WITH MS. NANDINI JOSHI, AGP for Respondent No. 1 & 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 16 / 03 /2002

C.A.V. JUDGEMENT

1. Mahendrasinh H. Jadeja and others-petitioners have filed this petition with a prayer for issue of a writ of mandamus directing the State Government through

the Secretary, General Administration Department - respondent No. 1 herein and the Gujarat Public Service Commission-respondent No. 2 to appoint the petitioners to a post in Gujarat Administrative Service (`GAS' for short) Class I in order of their ranking in selection at Annexure-A and go on making appointment till the shortfall of direct recruits is exhausted. The petitioners have further prayed that this court may direct the State Government to confer upon the petitioners the benefit of deemed date of appointment to a post of GAS Class I with effect from the date they were entitled to appointment in order of their ranking in the select list and confer upon them all consequential benefits as to seniority, pay fixation, arrears of pay, future promotions etc.

2. All these contentions were placed before this Court (Coram: S.K. Keshote, J) on 25.11.1997 and at that time the court heard the matter and disposed of it with a direction to the Chief Secretary of the State of Gujarat to constitute a High Power Committee under his Chairmanship consisting of the Revenue Secretary, the Secretary General Administration Department, and the Law Secretary. The petitioners shall lodge their claim of seniority as well as their grievance against the seniority list challenged in this petition before the Chief Secretary to the State of Gujarat within certain period and after giving an opportunity of hearing to the petitioners, the matter will be decided by passing a reasoned order. The Committee will consider the relevant decisions in this behalf. Thereafter, the petitioners represented their case. However, the Committee by its order dated 27.11.1999 has rejected the representation of the petitioners (see: page 108). The petitioners, have therefore challenged the said order of the Committee in this petition.

3. The facts which emerge from the record of this petition are as under:-

3.1 Respondent No. 2, Gujarat Public Service Commission (hereinafter referred to as `GPSC') had by its advertisement dated 1.10.1985 invited applications for 101 posts in GAS Class I along with other posts. The petitioners underwent written test and secured marks to be called for personal interview. Having been successful in personal interview/oral test, they were selected and placed in the waiting list for Class I service. The waiting list consisted of 96 persons. The names of petitioners appear in the waiting list. It was stated

that in all 101 persons who are in Part I select list have been appointed. In addition thereto, first 13 persons in the Part II of the select list i.e. the waiting list hitherto have been appointed or are in the process of being appointed.

3.2 The petitioners state that Article 309 of the Constitution of India provides for recruitment and conditions of service of persons serving the Union or the a State. In exercise of power conferred under Article 309 of the Constitution of India read with the order of the President published in Government of India, Ministry of Home Affairs, Order No. G.S.R. 35-E, dated 9.2.1974 the Governor of Gujarat enacted Rules known as Gujarat Administrative Service Rules, 1974 (hereinafter referred to as `the Rules')

3.3 Rule 3 of the Rules provides for the constitution of Gujarat Administrative Services. Rule-4 provides for the composition of the Service - The service shall consist of the following officers, namely:

(a) Officers who had been regularly holding any of the posts specified in clauses (a) and (b) of sub-rule (2) of Rule 3 on the appointed date.

(aa) Officers who had been regularly appointed to any of the posts specified in clauses (a) and (b) of sub-rule (2) of Rule 3 but holding on the appointed day posts other than the aforesaid posts, on account of temporary promotion, or on deputation.

(b) Officers recruited to the Services in accordance with the provisions of Rule 5.

3.3A Rule 5 provides for recruitment to the service which reads as under:

"(1) Recruitment to the service, after the appointed date, shall be made by promotion and by direct selection in the ratio of 2:1 as indicated below:

(i) By promotion of officers of proved merit and efficiency who have put in not less than 5 years service in the cadre of Mamlatdars or, as the case may be of the Officers belonging to Gujarat Development Service, Class II and who have passed the departmental examination prescribed for the time being by the Government for services in the

said cadres, and

(ii) by direct selection on the result of a competitive examination held by the Gujarat Public Service Commission in accordance with the rules made by Government for the Gujarat Civil Services Recruitment (Examination) Rules, 1969 as amended from time to time.

Provided that promotions from amongst the officers of the cadre of Mamlatdars and from amongst officers belonging to the Gujarat Development Service, Class II shall be in the ratio of 3:1 or such other ratio as may be fixed by the Government from time to time.

Provided further that an officer on promotion to a post in the Service shall be required to undergo such training as may be prescribed by the Government and such promoted officer shall be on probation for a period of one year."

3.4 On the basis of the said rules, the petitioners submitted that it is an unqualified provision for quota rule. It is submitted that vacancies not filled from any of the cadres are required to be carried forward and the number refers for each of the categories is required to be filled up by the candidates selected from that category only. The Government has also issued a Resolution dated 29.3.1988 by which the Government published seniority list of GAS Service Class I as on 31.12.1984. The Resolution contains Annexure `I' that had given periodwise workout of the total number of vacancies and how they were filled up by direct recruitment or by promotion. The total of this workout was that there were 147 vacancies carried forward for direct recruitment. In other words, the shortfall in the number of vacancies that should have been filled by direct recruitment was to the extent of 147. The petitioners relied on the Government Resolution dated 29.3.1988 along with the annexure showing shortfall of the direct recruits as on 31.12.1984.

3.5 The petitioners further submitted that the shortfall in the vacancies reserved for direct recruits has increased over the year and as on 31.3.1990 it was 161 i.e. 161 promotees were holding posts reserved for direct recruits and at one stage as on 30.11.1989 the shortfall of direct recruits was 238 but it has since been reduced to 161 because certain vacancies have been

filled by direct recruits. It was submitted that the shortfall of direct recruits in the matter of appointment to GAS Class I is required to be covered up by appointment of direct recruits only, as per mandatory binding provision of Rule 5 of the Rules. Although 161 direct recruits are required to be taken, available direct recruits i.e. those who are qualified and selected by the Constitutional Body like G.P.S.C. are only about 83 (the waiting list is of 96 persons, but as stated earlier 13 hitherto have been appointed or are being appointed, so available candidates are 83 only (96-13 = 83). It was submitted that even if all the 83 selected persons are taken up for appointment to GAS Class I, there will still be a shortfall of direct recruits. In spite of this glaring reality, the Government went on making appointment by promotion.

3.6 It was further submitted by the learned counsel for the petitioners that the result by the G.P.S.C. notifying the petitioners' selection was declared on 30.11.1988 and was published in Gazette on 31.12.1988. The petitioner came to know about shortfall in the quota of direct recruits to be appointed by the Government. The petitioners along with others made a representation dated 16.2.1989 to the Hon'ble the Chief Minister pointing out the factual position as to the deficit of the direct recruits in GAS Class I. The petitioners did not receive any reply and therefore they made a reminder on 25.7.1989. With the said reminder the petitioner gave break up of the position of the direct recruits vis-a-vis promotees, showing the consistent pattern of shortfall of direct recruits and excess of promotees in the cadre. In respect of that in December, 1989 appointments were made to GAS Class I. However, the number was confined to 78 posts notwithstanding the fact that the deficit was much larger. The petitioners therefore again made representation-cum-reminder dated 21.3.1990 addressed to the Hon'ble the Chief Minister. The petitioners also made requests to the Secretary, G.A.D. by representation dated 21.3.1990 in the form of alternative prayer that if no immediate decision is taken about appointment of direct recruits, the existing select list may not be scrapped. Meanwhile the petitioners apprehend that G.P.S.C. will declare the result or will publish part of select list for GAS Class I which would result in cancellation of the select list and cause irreparable injury to the petitioners. Therefore, the petitioners had filed the present petition.

4. On the above facts, the petitioners made the following submissions:

4.1 The petitioners therefore submitted that due to mandatory provisions of Rule 5, vacancies not filled from any of the cadres are required to be carried forward and the number referred for each of the category is required to be filled up by the candidate selected from that categories only.

4.2 It was further submitted that while publishing the final seniority list of the officers appointed to the GAS during the period from 1974 to 1984, the Government of Gujarat issued Resolution dated 29.3.1988 wherein the Government was pleased to notify the shortfall of direct recruits to the extent of 147 (at page No. 34). The learned counsel relied on the statement showing the vacancies and distribution according to the ratio applicable. The petitioner has relied on the Government Resolution dated 29.3.1988 particularly on page 34 of the compilation and stated that since 1974 the Government had not filled up any post of direct recruit and for the first time the posts of direct recruit were filled up in 1981 and thereafter till 1984 there were vacancies of 147 posts and the said posts of direct recruits were filled up by promotion in violation of statutory quota rules.

4.3 The learned counsel for the petitioners submits that shortfall in vacancies reserved for direct recruits has increased over the year and on 31.3.1990 it was 161. For that purpose the petitioners have relied on page 35 of the petition which shows the position of promotion of direct recruits of GAS Class I. The petitioners therefore submit that there is an admitted position that in spite of shortfall of 161 direct recruits, Gujarat Public Service Commission has selected only about 83 persons (waiting list of 96 persons out of that 13 persons are selected). The learned counsel for the petitioners submitted that if all these 83 persons are selected then also there is shortfall of direct recruit. The learned counsel for the petitioner submits that the advertisement dated 1.10.1985 invited application for only 101 posts contrary to Rule 5 of GAS Rules/ the statutory quota rules. The petitioners are challenging issuance of the advertisement not following the statutory binding quota rules which has resulted into excess promotion to more than 79 posts already existing at that time.

4.4 The petitioners further submit that in spite of the above admitted position and knowing fully well that there is a shortfall of direct recruits, the respondents declared that the select list is valid for two years or till next result is declared by the Gujarat Public

Service Commission. The select list was valid upto 30.11.1990 but it may lapse on the declaration of the result of the Gujarat Public Service Commission in the month of May, 1990.

4.5 It has been contended that the petitioners have challenged before expiry of selection (waiting) list and this court has interfered and kept alive the waiting list while admitting the matter. From the record it appears that on 23.5.1990 the court issued notice for admission and directed that meanwhile respondents are directed not to fill in posts of GAS Class I and thereafter on 13.8.1990 the court passed the following order: "Learned counsel Mr. A.R. Dave appearing for the respondents requests for time. Time granted. Ad-interim relief granted earlier to continue till September 11, 1990. It is clarified that qua the petitioners the select list produced at Annexure-A shall not be deemed to have lapsed till further order."

4.6 The learned counsel for the petitioners further submitted that by order dated 27.11.1999 the Government rejected the applications/representations of the petitioners. It was submitted that the Government had filled up 79 posts of Deputy Collectors, Class I by giving promotion to Mamlatdar which were reserved for direct recruits having shortfall of the direct recruits, the Government has violated the quota rules.

4.7 It was submitted that while rejecting the representation of the petitioners the Government has taken into consideration that the waiting list (in para 2 at page 111) for ten candidates (petitioners) will remain in force. It was contended by the petitioners that the Government has filled up 79 posts of Deputy Collectors, Class I, by giving promotions to the Mamlatdars which was reserved for direct recruits having shortfall of direct recruits. Thus it was submitted that the Government has violated quota rules.

4.8 It was further submitted that the Government has stated that these promotees were pushed down but has not stated why the quota rule to fill up the post by direct recruitee has not been followed. The petitioners submit that in para 5 of the said order at page 112 of the petition the Government has relied on the GAD Circular dated 27.12.1983. It was submitted that the said Circular envisages only two situations for operating the waiting list. The second condition "b" is that if there is some extreme exigency the Government may as a matter of policy decision, pick up candidates from the waiting

list even against the non-requisitioned vacancies. The petitioners submitted that the Government has not thought it fit to exercise condition "b" to follow the quota rules and the petitioners are denied their right of consideration in the matter of appointment only to favour the promotees which is in violation of Articles 14 and 16 of the Constitution of India.

4.9 The learned counsel for the petitioners stated the following proposition and in support of the same the petitioners have relied on several authorities in this behalf. As regards the first contention as to whether the Government can advertise the posts ignoring the quota rules and whether the post can be requisitioned in lesser numbers than the existing vacancies. It was further stated as to whether the waiting list after the interim order passed by this court can be operated. In support of the aforesaid contention the petitioners have relied on the decision of the Hon'ble Supreme Court in the case of STATE OF U.P. VS. RAMSWAROOP SAROJ reported in AIR 2000 SCW page 779 = AIR 2000 SC 1097 wherein the Hon'ble Supreme Court has on page 1099 at para 10 held as under:

"Similarly, the plea that a list of selected candidates for appointment to the State services remains valid for a period of one year only is primarily a question depending on facts and yet the plea was not raised before the High Court. Secondly, we find that the select list was finalised in the month of November, 1996 and the writ petition was filed by the respondent in the month of October, 1997 i.e. before the expiry of one year from the date of the list. Merely because a period of one year has elapsed during the pendency of litigation, we cannot decline to grant the relief to which the respondent has been found entitled to by the High Court. We may place on record that during the course of hearing of SLP before this Court, on 29.9.1999 we had directed the learned Additional Advocate General for the State of U.P. to bring on record on affidavit the status of present recruitment of the judicial officers and the present vacancy position in the subordinate judiciary. In the affidavit of Joint Secretary, Department of Appointment, State Government, Uttar Pradesh sworn in on 4.11.1999 and filed before this Court it is stated that as on 14.10.1999 there were 231 vacancies existing in the cadre of Munsif Magistrates (now Civil Judge, Junior

Division/Judicial Magistrates). That being the factual position we see no reason why the direction made by the High Court should be upset in an appeal preferred by the State of Uttar Pradesh."

4.10 Thus, this court may examine whether the petitioners were entitled to be appointed in case of shortfall of direct recruits in the year 1984-85 as of right or as a matter of right.

4.11 The second contention was regarding as to whether waiting list can operate or not. In support of this contention, the learned counsel for the petitioners has relied on the judgement of GUJARAT STATE DY. EXECUTIVE ENGINEERS' ASSOCIATION VS. STATE OF GUJARAT AND OTHERS reported in 1994 Supp. (2) SCC 591 wherein the Hon'ble Supreme Court has on page 597 at para 6 observed as under:-

"Even then we would examine if the exercise undertaken by the High Court of determining the quota and direction to Government to appoint is well founded in law. Before deciding these issues it ay be pointed out that the direction to work out vacancies and appoint candidates from the waiting list, the High Court did not find that the selection held in 1980 was for lesser number of vacancies than was available for direct recruits. Rather it held that vacancies of 1979-80 and 1981-82 could not be taken into account as even if there were any they had lapsed under proviso to Rule 3. It is not disputed that selections were held, both, in 1980 and 1982 for certain number of vacancies and the candidates who were found suitable were placed in the select list. And those who had got lesser marks were placed in the waiting list. Therefore, the vacancies advertised for which selections were held had been filled in accordance with the Recruitment Rules on recommendations made by the Commission. No further exercise was necessary. But the High Court proceeded to determine the quota after taking into consideration (a) vacancies in permanent posts (b) vacancies in temporary posts - whether duly created or existing (c) vacancies on account of retirement and (d) vacancies on account of the officers sent on deputation to other Departments and Corporations for reasonably long period for the purpose of applying quota rules. It did not agree with the State Government that apart from

(a) and (b) the vacancies arising out of (c) and (d) could not be taken into account for determining the quota. Consequently, it issued directions to the State Government to appoint persons from the waiting list and if the quota of direct recruits in one year exhausted then they were to be accommodated in vacancies thus calculated for the next year. One of the reasons for this direction was the enforcement of the proviso to Rule 3 which provided that if the vacancies of direct recruits were not filled in one year they shall not be carried forward and shall lapse. The High Court held that this rule was likely to cause hardship to the direct recruits as was apparent from the list filed by the State Government which clearly demonstrated that large number of promotees were appointed in excess of their quota."

4.12A Further on page 599 at para 10 of the said judgement the Hon'ble Supreme Court has held as follows:

"How a waiting list is to operate in the State is clear from a circular issued by the State Government on 27.12.1983.

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Although the circular was issued in 1983 but it only attempted to clarify what was the implied purpose of a waiting list. Even without it, the operation of a waiting list should be confined to the vacancies notified for that examination and not for any vacancy arising in future unless a policy decision is taken by the Government to that effect. Appointment in future vacancies from waiting list is prepared by the Commission should be exception rather than the rule. It has many ramifications. In any case, the High Court should not have assumed upon itself the role of appointing authority unless it found that the Government was acting arbitrarily. No rule has been shown that selection of direct recruits was to take place every year. In absence of such rule, the proviso could not apply. However, its validity was not challenged either in the High Court or in this Court. It has, therefore, to be construed so as not to defeat the objective of its enactment. For its working reasonably it has to be understood that once recruitment by direct selection has been made in any year then the

quota of direct recruits till then should be deemed to have been exhausted and if any vacancy could not be filled for any reason then it should be deemed to have lapsed and could not be carried forward."

4.12B The Hon'ble Supreme Court in the aforesaid case laid down a law that future vacancies cannot be filled up from the waiting list. But in that case there was no shortfall of direct recruits at the time of advertisement. Here in this case there are admittedly vacancies of 69 posts and in that situation petitioners of this petition are not seeking any appointment from future vacancies but are seeking vacancies from their own quota which the Government is statutorily required to follow. The petitioners state that they are relying upon this judgement to show the statutory rule is binding.

4.13 The learned counsel for the petitioners stated that in this case the petitioners as well as the respondents have relied on the judgement of the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra). The State has relied upon to say that the petitioners cannot claim right of appointment because (1) they are in the waiting list; and (2) the placement in the waiting list cannot be used for availing the appointment to the posts, which are not advertised. This submission would be valid, if the State had worked out the vacancies in accordance with the quota rule and issued the advertisement for direct recruit as required by the statutory quota rule. Even according to the respondent State as on 31.12.1984, the deficit of direct recruit was 147. The advertisement for the post was issued on 1.10.1985. The selections were notified in November, 1988 and recruitment began in December, 1989. So having violated the quota rule from the very beginning and having not issued the advertisement as per the quota rule, the State has violated the law declared by the Hon'ble Supreme Court in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra). When the Hon'ble Supreme court made observations relied on by the State in above case, the Hon'ble Supreme Court specifically observed in para 6 of the judgement that before giving its direction the "High Court did not find that selection held in 1980 was for lesser number of vacancies than was available for direct recruit." Here the admitted fact shows that advertisement and selection were for the lesser number of vacancy than was available for direct recruit. In fact, the respondents' submissions show that they did not even bother to find out that they are issuing advertisement for lesser number of vacancy when even in December, 1984,

the deficit was of 147. So the reliance on the judgement in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra) is totally untenable and would be in clear perversion of the law declared by the Hon'ble Supreme Court in the said case.

4.14 The learned counsel for the petitioners further stated that one aspect of the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra) is that direct recruits are entitled to be considered in the vacancies, which are available for direct recruit. The learned counsel for the petitioners relied on paras 6 and 10 of the said judgement in this behalf.

4.15 The learned counsel for the petitioners further submitted that the Hon'ble Supreme Court in waiting list has said that the waiting list cannot be used for filling up future vacancies. The petitioners are not seeking any appointment to any future vacancies but the petitioners state categorically that they are seeking appointment to the vacancies which existed at the time of issuance of the advertisement in October, 1985. These vacancies have to be filled up even from the waiting list as stated by the Hon'ble Supreme Court in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra). In this regard the learned counsel for the petitioners has relied on para 10 of the said judgement.

4.16 It is further submitted that in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra) the Hon'ble Supreme Court has further held that the wait listed candidates can claim appointment to the vacancies that became available within a period the list is to operate. In this regard reliance is placed on para 8 of the judgement. So in the present case, all these vacancies and deficit as on 31.12.1984 and those arose upto the expiry of the waiting list are the only vacancies on which the petitioners are claiming appointment and in no other vacancies. This is also the requirement of Government Circular dated 27.12.1983.

4.17 The petitioners are also relying on the judgement of Division Bench of this court (Coram: B.N. Kirpal, C.J. (as he was then) and A.N. Divecha, J) in the case of COMMISSIONER OF POLICE, AHMEDABAD VS. SANTOSH MALI AND OTHERS reported in (1995) 2 CLR 521, Gujarat, wherein in para 12, this court has held as under:-

"The inescapable conclusion which follows from the aforesaid decision of the Supreme Court is that a select list is valid in respect of only

those vacancies as contemplated by the Government Resolution of 19th December, 1990. In other words, it is in respect of the actual vacancies in existence or anticipated vacancies within the period of one year in respect of which the selection list can be in operation. The learned single judge, with respect, was not right in issuing a direction which is contrary to the aforesaid ratio of the Supreme Court."

4.18 The learned counsel for the petitioners has made the following submissions against the reply filed by the respondent State in this behalf:

4.19 The learned counsel for the petitioners submitted that an attempt was made in the course of argument by the learned counsel for the respondent State as if the recruitment rule, particularly the reading of Rules 4 and 5 would show that the rule applies only for the fixation of quota for the purposes of seniority only and not for the purposes of appointment. It is further submitted that such approach is manifestly contrary to the plain language of the recruitment rule at Annexure-B to the petition. These rules are made under the proviso of Article 309 of the Constitution. The very title of Rule 5 reads "recruitment to service". Rule 4 specifically provides for the "Officers recruited to the services in accordance with the provision of Rule 5". Rule 5 is the rule of recruitment only. There is no other rule in the entirety of the recruitment rule suggesting nothing contrary.

4.20 Further Rule 5 provides in a mandatory language that the recruitment `shall be made by promotion and by selection in the ratio of 2:1 as indicated below...' and it also provides in what proportion the direct recruit and promotees will be selected. It is not the rule of seniority at all. Quota rule is always rule of recruitment, because it provides for sources of recruitment. It is when the Government violates the quota rule to adjust the seniority in accordance with the quota rule, so that the illegality committed by the State can be rectified without hurting those, who are already appointed. But from this, it can never be argued that the recruitment rule providing for quota is a rule of seniority as observed by the Hon'ble Supreme Court of India in the case of Shri N.K. Chauhan (supra). It depends on the language of the rule and here the language of rule 5 is mandatory that appointment to the service shall be made in the ratio of 2:1

4.21 The learned counsel for the petitioners submitted that Rule 5 is the Rule of Recruitment and not the rule of seniority as already submitted hereinbefore and fixation of seniority in accordance with the quota rule is a consequential matter. It is not right to say that rule 5 is the Rule of seniority but in violation and utter disregard of the plain language of the rule. If the statutory rule of recruitment is violated, the victims can certainly come to this court and this court in exercise of its powers under Article 226 of the Constitution would certainly protect them.

4.22 The learned counsel for the petitioners further submitted that the petitioners are relying on the statutory recruitment rule mandatorily providing for the quota for the appointment and unfortunately it is the State which is trying to disturb the rule saying that such a rule is a Rule of seniority. The learned counsel further submitted that Rule 5 is the only rule of recruitment.

4.23 In this case the advertisement issued should have been for 147 vacancies of the deficit as on 31.12.1984 plus existing and anticipated vacancies till next selection as required by the rule and Government Notification and Government Resolution dated 27.12.1983 itself. In fact, the advertisement was issued for 78 vacancies only. Thus, denying the petitioners' right of being considered to the promotional existing vacancies is in violation of their fundamental right under Articles 14 and 16 of the Constitution of India.

4.24 The learned counsel for the petitioners further also relied on the following judgements of the Hon'ble Supreme Court:

4.24(A) VIRENDER S. HOODA AND OTHERS VS. STATE OF HARYANA AND ANOTHER reported in (1999) 3 SCC 696 in which at paragraphs 3 and 5 the Hon'ble Supreme Court has held as under:-

"Para 3 - So far as the first conclusion recorded by the High Court is concerned, it is clear that this Court, while disposing of the appeal filed by the appellants, made clear that it would be open to the appellants to file a proper writ petition before the High Court for putting forth appropriate contentions on the basis of earlier selection in the context of Circular dated 22.3.1957 read with Circular dated 26.5.1972.

This order was passed by this Court on 13.10.1995 and the appellants filed a writ petition on 29.1.1996. Particularly when Appellants 2 and 3 were allowed as co-petitioners in the special leave petition before this Court, we do not think that the High Court was justified in deciding against the appellants on the ground of laches. The fact that there were further vacancies available and when 9 vacancies were advertised to be filled up within a period of six months after announcement of the previous selection cannot be disputed at all. In terms of the circulars issued by the Government on 22.3.1957 and 26.5.1972 when such vacancies arise within six months from the receipt of the recommendation of the Public Service Commission they have to be filled up out of the waiting list maintained by the Commission. In respect of the vacancies which arise after the expiry of six months it is necessary to send the requisition to the Commission. It is also made clear that if the Commission makes recommendations regarding a post to the Department and additional vacancies occur in the Department within a period of six months on the receipt of the recommendations, then the vacancies which occur later on can be filled in from amongst the additional candidates recommended by the Commission. It is urged on behalf of the appellants that letter dated 7.1.1992 indicated that the cadre strength in the Haryana Civil Service (Executive Branch) was 440 and the officers filling these posts were around 129 and there was a shortfall of 111 and 23 posts had to be filled up by direct recruitment. Thus 12 posts for direct recruitment were vacant when the advertisement for recruitment was made which was held in 1991. Therefore, the appellants' case ought to have been considered when some of the vacancies arose by reason of non-appointment of some of the candidates. Therefore, the Government ought to have considered the case of the appellants as per the rank obtained by them and the appellants had to be appointed if they came within the range of selection. Thus when these vacancies arise within the period of six months from the date of previous selection the circulars are attracted and hence the view of the High Court that vacancies arose after selection process commenced has no relevance and is contrary to the declared policy of the Government in the matter to fill up such posts from the

waiting list.

Para 5 - Therefore, we have no hesitation in directing the respondents to consider the cases of the appellants for appointment to posts of the Haryana Public Service (Executive Branch). However, it is made clear that the appellants shall be fitted to the posts ranking below to those who had been selected along with the appellants at the time of recruitment made pursuant to the result declared on 19.6.1992. The appellants will be fitted in appropriate posts and they will be accorded appropriate scale of pay by giving them the benefit of increments, if any, but they will not be entitled to any monetary benefits for the period for which they have been kept out of employment. Let such action be taken by the Government expeditiously but not later than a period of three months."

4.24(B) Reliance is placed on the decision in the case of PREM SINGH AND OTHERS VS. HARYANA STATE ELECTRICITY BOARD reported in (1996) 4 SCC 319. The learned counsel for the petitioners has relied on para 3 of the said judgement. He has also referred to para 8 which refers to the finding of the High Court, para 14 where contention of the counsel for the appellant has been noted, para 20 where the Hon'ble Supreme Court has considered the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra). After referring to the same in paras 25 and 26 on pages 331 & 332 the Hon'ble Supreme Court has observed thus:

"Para 25 - From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of ore posts than advertised is challenged the court may not, while exercising

its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.

Para 26 - In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2.11.1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appoints which were made against future vacancies - in this case on posts which were newly created - must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs."

4.25 The learned counsel for the petitioners therefore submitted that these two judgements of the Hon'ble

Supreme Court show how the Hon'ble Supreme Court has applied the required of quota rule and waiting list in the light of the judgement in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra) and further showing that appointment to the post of greater in number than the advertised post can be made than the rules and justice so require. Since in this case the Government has acted arbitrarily in selecting the number of posts to be advertised and to be filled up from the quota of direct recruit, in gross violation of the statutory rule, this court can direct the Government to fill up the post in accordance with the quota rule as specifically permitted by the Hon'ble Supreme Court of India in para 10 of the judgement in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra).

4.26 The learned counsel for the petitioners thereafter contended that as regards the judgement in the case of SHRI PREM SING (supra) relied on by the respondents is fallacious, because it ignores the basic requirement laid down in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra) because that requisition has to be for the number of vacancies as required by the quota rule. For that purpose he has relied on para 6 of the judgement in the said case. He submitted that if the requirement is followed then only the observations from para No. 25 of case of SHRI PREM SINGH (supra) quoted by the respondent could be relied upon that only the advertised post can be filled up. If the submissions of the petitioners were right, then the Hon'ble Supreme Court would have overruled the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION and the other judgements relied upon by the petitioners could not have taken place and would not be good law. Reliance on the case of SHRI PREM SINGH (supra) by the respondent State is untenable. The approach of the respondent State resulted inadvertently of the right of the petitioners of being considered for the very vacancies, which are statutorily provided for the direct recruits by the recruitment rule.

4.27 The learned counsel for the petitioners submitted that the reliance placed on the case of SHRI SURINDER SINGH (supra) by the respondent State is misplaced because of the same reasons which are stated in the previous paragraph. It is further submitted that the Hon'ble Supreme Court has held that the waiting list cannot be used as a perennial source of recruitment. In the context of the fact, waiting list cannot be used for future vacancies.

4.28 The learned counsel for the petitioners submitted

that here the petitioners are not seeking appointment to any future vacancies and they are seeking appointment to the existing vacancies on the date of advertisement and which were wrongly not advertised. The respondent State cannot claim arbitrary right of advertising less number of posts than the required by the statutory rule and then say that once the advertised posts are filled up the people in the waiting list do not have any right. This would amount to asking for licence to act in arbitrary manner in the number of posts to be advertised by the State de hors the rule which the Hon'ble Supreme Court has specifically rejected in all the judgements including in the case of GUJARAT STATE DEPUTY ENGINEERS' ASSOCIATION (supra)

4.29 The learned counsel for the petitioners further submitted that under Article 226 of the Constitution this court would not ask the State to advertise particular number of posts, if the State advertises the posts in accordance with the rule. But if the respondent State advertises the posts for lesser number of vacancies than are available for direct recruit and then filling up those very vacancies unlawfully by promotees for extraneous reasons then this court can certainly direct the Government to act lawfully and declare the promotion unlawful and direct the State to fill up the posts of direct recruits from the direct recruits available from waiting list and selected by Gujarat Public Service Commission only. Here the petitioners are seeking very small relief of their appointment and deemed date of seniority and consequential benefits and are not even seeking the quashing of any promotion.

4.30 The learned counsel for the petitioners submitted that the Government can advertise less number of posts than available on the ground that they need less number of people. But the State cannot advertise less number of posts and then fill up the posts available in the quota of direct recruit by promotees. This would be violative of statutory rule and Articles 14 and 16 of the Constitution and show their mala fide. Reliance on the case of STATE OF HARYANA VS. SUBASH CHANDER MARWAHA reported in AIR 1973 SC at page 2216 in para No. 11 and the case of T.N. ADMINISTRATIVE SERVICE OFFICERS' ASSOCIATION VS. UNION OF INDIA reported in AIR 2000 SC 1898 in para No. 12 of the Written Submissions is, thus misplaced.

4.31 The learned counsel for the petitioners submitted that reliance placed on the decision in the case of SHRI NILANGSHU BHASAN BASU VS. DEB K. SINHA & OTHERS

reported in JT 2001(7) SC 233. Learned counsel submitted that it is a matter of administrative policy to decide the method of recruitment and the administrative authority has to act in accordance with the statutory recruitment rule and not arbitrarily. In this case the respondent State has violated the statutory rules and the judicial review. The reliance on judgement in the case of SHRI NILANGSHU BHASAN BASU (supra) is based on distorted reading of the judgement.

4.32 The learned counsel for the petitioners further submitted that so far as reliance placed on the decision in the case of SHRI SURAJ PRAKASH GUPTA VS. STATE OF JAMMU AND KASHMIR reported in AIR 2000 SC 2386 by the respondent is concerned, the petitioners are not claiming appointment from the date prior to the date of their selection. So the submission made in this paragraph 15 of the written submissions by the respondent State is irrelevant. It is further submitted that if the State unlawfully deny the appointment and if this court so finds, the deemed date of seniority is given routinely by the authority and by this court from the date when the appointment should have been given, but that would be never prior to selection.

4.33 It is further submitted that this court can give relief from the date of appointment and subsequent facts have to be seen. In the light of the controversy vis-a-vis the petitioners are not for the arbitrarily denying the relief to the petitioners who may have been wronged. So far as the reference to the subsequent examinations is concerned, it is submitted that the petitioners were age-barred and hence they could not apply.

4.34 The learned counsel for the petitioners submitted that petitioner No. 3 Shri Hitesh Oza was aged barred before 1988 and petitioner No. 6 Shri Shailesh Shah was also age-barred from 1991 onwards. Furthermore the petitioners were protected by the interim order of this court and therefore, there was no need to apply even if they are eligible. The effect of submission of the date would be defeating the interim order of this court. The approach of the respondent State seems to be denying the petitioners relief by any means, whether fair or not.

4.35 The learned counsel for the petitioners further submitted that State has failed to point out any judgement showing that the State can issue the advertisement for lesser number of vacancy than are available for direct recruit and then fill up those very

vacancies by promotees. It may be pointed out that the petitioners are seeking the right of appointment not merely from the fact that they are empaneled in the waiting list but further from the fact that while the waiting list was operative, the vacancies available for the direct recruit under the mandatory statutory rule have been unlawfully and unconstitutionally filled up by promotion. None of the judgements cited by the respondent State would condone such an unlawful action of the State. The learned counsel for the petitioner submitted that in the present case it is demonstrated from the Government's own documents that while issuing the advertisement the actual deficit of direct recruit existed on the date was ignored and the enforceable vacancies were also ignored. So the reliance placed on the judgements of the Hon'ble Supreme Court in the case of Sanjoy Bhattarjee (supra), N. Mohanan (supra), Jayamohan (supra) and Haraprasad (supra) is not only misplaced but misleading.

4.36 It is further submitted by the learned counsel that the State has admitted that they did not even bother to identify the vacancies available for the direct recruit and obviously the advertisement was issued for lesser number of posts. Though this is the new fact introduced by the State for the first time in the written submissions, the admission is more damaging to the State rather than helpful.

4.37 The learned counsel for the petitioners further relied on the judgement of the Hon'ble Supreme Court in the case of STATE OF U.P. Vs. RAM SWARUP SAROJ which clearly shows that if the waiting list is expired during the pendency of the petition, that cannot come in the way of the petitioners as the eligibility of the reliefs is to be seen on the date of the petition and not on for a subsequent period. The learned counsel has relied on paras 2, 5,8 and 10 of the said judgement.

4.38 In view of the submissions made at the bar and hereinabove, the learned counsel for the petitioner further submitted that this court may be pleased to allow the petition with costs and grant the reliefs by giving appointment to the petitioners from the date when the last appointment from the waiting list was made and before the first unlawful promotion is given. (79 unlawful promotions were given as admitted by the respondent State in affidavit in reply on running page 65 and internal page 56). He further submitted that it may further be pointed out that this affidavit in reply of the State admits in para 2 at page No. 111 that in the

cadre of GAS Class I, promotion were given in the name of exigencies. The petitioners further submit that in para 5 of the said order at page 112 of the petition the Government has relied on GAD Circular dated 27.12.1983 envisages only two situations for operating waiting list. The second condition `b' is that if there is some extreme exigency, the Government may, as a matter of policy decision, pick up candidate from waiting list even against non-requisitioned vacancies. The petitioners submit that the Government has not thought it fit to exercise the said condition `b' to follow the quota rules, even though there was an extreme exigency and they were readily available and the petitioners are denied their right of consideration in the matter of appointment only to favour the promotees by giving unlawful promotion in excess of their legitimate quota, which is in violation of Article 14 and 16 of the Constitution. It is further submitted that the State when it suits them for their own reasons, appointed people from the waiting list much more than the posts advertised as would be clear from the statement at Annexure-I. The statement shows the details showing the waiting list operated and vacancies filled up more than advertised posts after 1983 (which is annexed with the written submissions). In this context, it is submitted that the court may see the hollowness of the argument of non-operation of waiting list by the State Government which is nothing but asking for licence for arbitrariness and pick and choose in the matter of application of the said GR dated 27.12.1983.

4.39 The learned counsel for the petitioners further submitted that finally it ay be pointed out that actual appointment is to be given only to petitioner No. 3, Shri Hitesh Oza, as petitioner No. 6 Shri Shailesh Shah has already been promoted to GAS Class I and both may be given deemed date of appointment and consequential reliefs by this court under Article 226 of the Constitution.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE RESPONDENTS:

5. Mr. S.N. Shelat, learned Advocate General with Ms. Nandini Joshi, learned A.G.P. appeared on behalf of respondent No. 1 and 2, namely, State of Gujarat and Gujarat Public Service Commission. Learned counsel for the respondents submitted as follows:

5.1 The learned counsel for the respondent submitted that in response to the advertisement for 78 posts in Class I Gujarat Administrative Service, pursuant to the

requisitions dated 16.2.1984, 21.7.1984 and 27.3.1984, the Gujarat Public Service Commission prepared a select list of 101 candidates and waiting list of 96 candidates. All the 78 posts were offered to the candidates from amongst the select list. 8 candidates did not join and thereupon waiting list was operated for 8 posts. All 78 posts which were advertised were filled in by 7.6.1990. No person above the petitioners in rank has been offered appointment from the waiting list.

5.2. The learned counsel for the respondent has relied on the affidavit and stated that General Administration Department had passed order dated 27.11.1999 (page No. 56) which is self explanatory and self-clarificatory. The learned counsel for the respondent State further submitted that in the instant case, 78 vacancies in the GAS Class I were advertised by Gujarat Public Service Commission on the basis of the requisitions for the years 1983-84, 1984-85, and 1985-86 sent by the Government and 8 candidates (out of 78 candidates of the main merit list) did not join in GAS Class I. Therefore, the Government had filled up those 8 vacancies by operating the waiting list. As regards the point of operating the waiting list, the government has relied on its Circular, General Administration Department No. PSC/1082/2587/G.2 dated 27.12.1983, the purpose of the waiting list is to fill up only those vacancies which may arise due to non-joining of the candidates from the main merit list as also to fill up those vacancies which may be required to be filled up on emergency basis. The waiting list cannot be used as an alternative to the requisitions for the subsequent years. The Circular of the General Administration Department dated 27.12.1983 is annexed at Annexure II to the affidavit in reply.

5.3 The learned counsel for the respondents stated that the claim of the petitioners is that instead of 78 posts on that date total 147 vacancies were available and therefore petitioners should have been offered appointment from the waiting list. It is submitted that the petitioners are not entitled to the relief in view of the following:

(i) No appointment can be offered to anyone from the select list or waiting list more than the posts advertised. All the 78 posts have been filled in from both the lists. Petitioners are lower in rank and therefore not entitled to any appointment.

(ii) No appointment can be offered without the posts

being advertised. Equal opportunity is required to be given to all. The advertisement was limited to 78 posts only. Therefore, even if there were more posts than 78, fresh advertisement has to be issued.

5.4 It was further submitted that in fact only 78 vacancies were determined when above dated requisitions were submitted. It is only when seniority list was finalised and representations were invited that it was noticed that more vacancies were available. These vacancies have been subsequently advertised. The petitioners could have availed of the opportunity. A statement showing details of the direct recruitment is produced. The said statement contains details regarding year of requisition, number of posts advertised, advertisement number and date of examination conducted by GPSC, date of the order of the appointment, number of candidates given direct recruitment, number of candidates who actually joined the G.A.S., number of candidates given appointment from the waiting list and also remarks.

5.5 The learned counsel for the respondent invited my attention to the office Order dated 27.11.1999 at page 118 in Annexure-III where it is observed as under:

"In so far as this particular combined Competitive Examination of 1986-88 is concerned, the requisitions for that examination were sent to Gujarat Public Service Commission on 16.2.1984, 21.7.1984 and 27.3.1984. It is pertinent to mention here that General Administration Department Resolution directing various departments to follow the principles of seniority as enunciated in the Hon'ble Supreme Court's judgement in Shri N.K. Chauhan's case was issued on 4.12.1986, i.e. about after more than one and half year of sending of the requisitions in question. Since the calculations of the vacancies in the given unit of year their allocations between direct recruitment and promotions, actual intake of direct recruits and promotees, shortfall or excess in direct recruitment or promotions etc. was worked out while preparing the seniority lists in the years 1987-88, it is obvious that, the more precise and actual figures of excess or shortfall in a particular quota, came to be known in 1987-88 only. Thus, on publication of the final seniority list dated 29.3.1988, the shortfall in the direct recruitment quota could be

ascertained. It must be appreciated that these figures of vacancies etc. could not have been planned retrospectively in the requisitions for the years 1983-84, 1984-85 and 1985-86. Thus, the requisitions for the years 1983-84, 1984-85 and 1985-86 were nearest to the calculations of each quota with reference to the statistics relating to vacancies etc. available at the time of sending of these requisitions.

Thus, the petitioners cannot say that the Government should have foreseen the situation arising out of implementation of the policy resolution of 4.12.1986 at the time of sending of requisitions to the years 1983-84, 1984-85 and 1985-86."

5.6 The learned counsel relied upon Resolution dated 29.3.1988 in Annexure-C of the Government while finalising seniority list, it is observed as under:-

"However, various points put forth in the representations received from the aggrieved GAS officers with reference to the said provisional seniority list published on 3rd April, 1986 particularly in respect of the method to be adopted for calculating year-wise vacancies, were examined carefully and objectively in the light of the peculiar characteristics of the GAS cadre and having regard to the observations made by the Hon'ble Supreme Court in the case of B.S. Gupta in C.A. No. 2060(N) of 71 and Civil Appeals 67, 139, and 393 of 1972 and also in the case of P.S. Mahal Vs. Union of India in Writ Petitions nos. 157-162 of 1976.

On careful examination of various aspects in respect of fixation of seniority inter se between promotees and direct recruits in the GAS, Government thought it necessary to change the method adopted for calculating the number of vacancies, while preparing the provisional seniority list of GAS officers published on 3.4.1986, as the number of year-wise vacancies arrived at on the basis of the requisitions sent to the GPSC did not give the correct and realistic picture of the vacancies from year to year in the cadre. Government, therefore, decided to take the actual number of appointments made in the GAS in a year as the number of vacancies for that year and published a revised provisional

seniority list under G.C.M., G.A.D. No. GAS-1486-309-G, 1 dated 15.4.1987 by applying the seniority principles as laid down by the Hon'ble Supreme Court in the case of Shri N.K. Chauhan. The said Government Circular Memorandum is self-clarificatory and shows the reasons for replacing the earlier provisional seniority list of 3.4.1986 by the revised provisional seniority list of 15.4.1987."

5.7 The learned counsel for the respondent has relied on the judgement of the Hon'ble Apex Court in the case of GUJARAT STATE DEPUTY EXECUTIVE ENGINEERS' ASSOCIATION VS. STATE OF GUJARAT reported in JT 1994(3) SC 559 = 1994 Supp. (2) SCC 591 in which at para 5 the Hon'ble Supreme Court has observed as under:

"..... Nor could the High Court direct the Government to appoint the direct recruits from the waiting list prepared in 1980 in the vacancy which according to the High Court should have been available as that would amount to interfering with discretion of Government which as a matter of policy may decide to fill lesser vacancies."

5.7A The learned counsel for the respondent has further relied on observations at para 8 as under:-

"....A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. He has no vested right except to the limited extent, indicated above."

5.8 It is submitted that statement of law aforesaid is in respect of the future vacancies which have not been notified by public advertisement but the same is also applicable to any vacancies not notified.

5.8A The learned counsel for the respondents submitted that the Circular dated 27th December, 1983 issued by the State Government was subject matter of interpretation in

this case and in para 10 the Hon'ble Court has held as under:-

"In any case, the High Court should not have assumed upon itself the role of appointing authority unless it found that the Government was acting arbitrarily. No rule has been shown that selection of direct recruits was to take place every year."

5.8B The learned counsel for the respondents further relied on the decision in the case of PREM SINGH AND OTHERS VS. HARYANA STATE ELECTRICITY BOARD AND OTHERS reported in JT 1996(5) S.C. 219 in which on page 229 at para 25 the Hon'ble Supreme Court has observed as under:

"....If the requisition and advertisement are for certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf."

5.9 The learned counsel for the respondents has further relied on the judgement of the Hon'ble Supreme Court in the case of SURINDER SINGH & ORS. VS. STATE OF PUNJAB & ANR. reported in JT 1997(7) SC 537. The Hon'ble Supreme Court again reiterated the law on the subject. Having quoted the aforesaid two judgements in paragraph Nos. 13 and 14, in paragraph No. 15, the Hon'ble Supreme Court has observed as follows:

"This Court has explained the scope and intent of a waiting list and how it is to operate in service jurisprudence. It cannot be used as a perennial source of recruitment filling up the vacancies not advertised. The Court also did not approve the view of the High Court that since vacancies had not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed. Candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative."

5.10 Relying upon the aforesaid judgements of the Hon'ble Supreme Court, the learned counsel for the respondents submitted that both the select list and the waiting list stood exhausted when all the vacancies advertised were filled in 1990. Interim order continuing the waiting list has no effect because the vacancies advertised have been filled in. The waiting list cannot be operated for the vacancies not advertised. The petitioner has no legal, enforceable right to claim appointment in respect of the posts which were not advertised.

5.11 The learned counsel for the respondents further submitted that the High Court under Article 226 of the Constitution of India, cannot interfere and decide as to how many posts are required to be advertised. It has been held time and again that it is a matter of policy for the State Government to decide as to how many posts are to be filled in. The learned counsel for the respondents has relied on the decision of the Hon'ble Supreme Court in the case of THE STATE OF HARYANA VS. SUBASH CHANDER MARWAHA AND OTHERS reported in AIR 1973 SC 2216 in which at para 8, it is observed thus:-

"One fails to see how the existence of vacancies gives a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 in Part C is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints

on the power to make the appoints, rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence."

5.12 The learned counsel for the respondents submitted that the aforesaid decision has been followed in T.N. ADMINISTRATIVE SERVICE OFFICERS ASSN. VS. UNION OF INDIA reported in AIR 2000 SC 1898. The Hon'ble Supreme Court has reiterated again as under:-

"It is a well settled principle in service jurisprudence that even when there is vacancy the State is not bound to fill up such vacancy, nor is there any corresponding right vested in an eligible employee to demand that such post be filled up. This is because the decision to fill up a vacancy or not vests with the employer, who, for good reasons, be it administrative, economical or policy, decide not to fill up such posts."

5.13 The learned counsel for the respondents has relied on the decision of the Hon'ble Supreme Court in the case of NILANGSHU BHASAN BASU VS. DEB K. SINHA & ORS. reported in JT 2001(7) SC 233 in which the Hon'ble Supreme Court has held thus:-

"It is the administrative function of the appointing authority to take a decision as to which method should be adopted for recruitment on any particular post. It is not for the judicial bodies to sit in judgement over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive."

5.14 The learned counsel for the respondents submitted that no legal enforceable rights flow from the recruitment rules. The rules only provide that when two promotions are effected one post is to be made available to the direct recruit. Therefore, the ratio laid down in rule 5 has to be reflected in the seniority list. If promotions exceed the ratio of 2:1 the promotees have to step down. The direct recruits have no right to claim seniority from the date of vacancies. Direct recruits

can claim seniority from the date of appointment only. No enforceable legal rights flow from Rule 5 that a mandamus be issued against the State Government for appointing the petitioners from the waiting list. How many posts are to be advertised is a matter of policy as aforesaid. Even if the petitioners were right in the facts of the present case, there has been subsequent advertisement and, therefore, the petitioners are not entitled to any relief.

5.15 The learned counsel further relied on the judgement of the Hon'ble Supreme Court in the case of SURAJ PRAKASH GUPTA VS. STATE OF JAMMU & KASHMIR reported in AIR 2000 SC 2386 in which at para 78 the Hon'ble Court has held as follows:

"Direct recruits cannot claim appointment from the date of the vacancy in quota before their selection. We have next to refer to one other contention raised by the respondent-direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitting that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under direct recruitment quota."

5.16 The learned counsel submits that the decisions cited on behalf of the petitioners only deal with the quota rules and implementation of the quota. The law indicated thereunder cannot be doubted and that promotees have to be pushed down.

5.17 The learned counsel for the respondents further submitted that on the facts of the case it has been overlooked that subsequently, i.e. after June, 1990, the State Government has by direct recruitment filled in the following posts:

No. of posts advertised	Date of Advt.	Date filled in

15 11.11.1988 Dec. 1990
Jan. 1991

79 July, 1990 17.3.1993
23.3.1993
16.4.1993

37 July, 1990 14.12.1995

13 August, 1992 21.6.1997

20 December 1993 17.9.1998
24.6.1999
29.7.1999

5.18 The petitioners had ample opportunity to compete in each one of the posts advertised and appear at the examinations. The petitioners are not entitled to relief in the present petition on the basis of their being selected on the waiting list when the posts advertised have already been filled in. It is trite position of law that court cannot grant an order of appointment merely because the petitioner has been empaneled in the waiting list. In this regard, the learned counsel for the respondents has relied on the following decisions:

5.18(i) N. MOHANAN VS. STATE OF KEARALA reported in AIR 1997 SC 1896. In this case on page 1897 at para 3 the Hon'ble Supreme Court has held as under:-

"The fact that candidates were appointed from the panel is proof of its publication. It is then contended that even though the petitioner has no right to be appointed since he was appointed on the basis of the order of the Court provisionally, the appointment already made should be allowed to be continued and should be regularised."

5.18(ii). SANJOY BHATTARJEE VS. UNION OF INDIA reported in AIR 1997 SC 2179

In para 4 the Hon'ble Supreme Court has held as follows:-

"For subsequent vacancies, every one in the open market is entitled to apply for consideration of his/her claim on merit in accordance with law and it would be consistent with the provisions of Articles 14 and 16(1) of the Constitution. Therefore, direction sought for not to fill up

the vacancies having arisen subsequently until the candidates in waiting list are exhausted, cannot be granted. The Tribunal rightly refused to grant any such direction."

5.18(iii) JAYAMOHAN VS. STATE OF KERALA reported in AIR 1997 SC 2619. In this case the Hon'ble Supreme Court has observed as under:

"In view of the fact the advertisement was restricted to the existing vacancies, namely, two posts, it is not incumbent upon the authorities to appoint the candidate from the waiting list. He has no right to appointment"....

"It is a settled legal position that merely because a candidate is selected and kept in the waiting list, he does not acquire any absolute right for appointment. It is open to the Government to make the appointment or not even if there is any vacancy. It is not incumbent upon the Government to fill up the same. But the appointing authority must give reasonable explanation for non-appointment."

5.19 In the facts of the case, the vacancies were not identified properly and the Government has subsequently advertised those vacancies.

5.20 The learned counsel for the respondents has further relied on the decision of the Hon'ble Supreme Court in the case of GOVERNMENT OF ORISSA VS. HARAPRASAD DAS reported in AIR 1998 SC 375 in which on page 377 at para 8 the Hon'ble Supreme Court has held thus:

"Merely because there were some vacant posts of Copy Holders and the Director of the Press had recommended to the Government to fill up those posts it was not open to the Tribunal to direct the Government to fill up those posts even though it had good reasons not to do so. It should have been appreciated by the Tribunal that mere empanelment or inclusion of one's name in the selection list does not give him a right to be appointed. So also if the Government decides not to make further appointments for a valid reason, it cannot be said that it has acted arbitrarily by not appointing those whose names are included in the selection list. Whether to fill up a post or not is a policy decision and unless it is

shown to be arbitrary it is not open to the Tribunal to interfere with such decision of the Government and direct it to make further appointments."

5.21 The learned counsel has further placed reliance on the decision in the case of SURINDER SINGH VS. STATE OF HARYANA reported in JT 2001(5) SC 461 in which it is observed as under:

"When the advertisement specifies the number of posts it is to make prospective applicant to consider to apply or not. If posts are few, the consideration would be different than when posts are larger. If number of posts is larger, there is always increase in number of applicants. So when the advertisement is only for 10 posts, selection for 20 which constitutes of two different phases for two different years, could not be justified".....

"These 10 additional posts selected is of a different year. There was no advertisement for filling up these posts. How can such selection be upheld.?"

5.22 The learned counsel for the respondents submitted that the decision relied on i.e. STATE OF U.P. VS. RAM SWARUP SAROJ reported in AIR 2000 SC 1097, only observes that if the petition has been filed during the pendency of the waiting list and if there are vacancies, the court can enforce the said waiting list. In the present case there are no vacancies in existence. All the vacant posts have been filled in. The select list and the waiting list get exhausted. Therefore, the said judgement has no applicability.

5.23 In view of the same, the learned counsel for the respondents submitted that the petition requires to be rejected.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONERS ON REJOINDER:

6. As against the above submissions, the learned counsel for the petitioners in rejoinder submitted as under:

6.1 Learned counsel for the petitioner submitted that it is noteworthy that the Government Resolution dated 29.3.1988 recognizes the deficit of 147 direct recruit as

on 31.12.1984 and this position was never disputed by the Government in any of its subsequent notification or publication. In the affidavit in reply it was never said that the Government did not know of the deficit before making appointment pursuant to November, 1988 selection by Gujarat Public Service Commission. In the impugned order dated 25.11.1997 passed pursuant to the order of this court (Coram: S.K. Keshote, J), it was never said that the Government did not know of the deficit of direct recruit at the relevant time i.e. before the Gujarat Public Service Commission selection or during the life time of the waiting list. It is for the first time that in the written submissions, an attempt is made that the Government did not know of the deficit at the relevant time. This is, thus, an afterthought and mere painfully and pertinently an admission of unlawful and arbitrary conduct of the Government because this is an admission of the fact that the advertisement for recruitment was issued without looking at the recruitment rules and without looking at its implementation, i.e. looking at the actual number of vacancies which are in deficit for direct recruit, the vacancies which are required to be filled in from the quota of direct recruit, existing and anticipated to be arisen during the life of the waiting list in compliance with the statutory recruitment rules. This conduct of the Government is in gross and strict violation of the law laid down by the Hon'ble Supreme Court in the case of GUJARAT STATE DEPUTY EXECUTIVE ENGINEERS' ASSOCIATION (supra) particularly observing in para 6 thereof. This would compel this court to find that not only the advertisement was issued for lesser number of vacancy than was available for direct recruit, but furthermore the Government had not even cared to look at the number of vacancies and arbitrarily decided that they would give only 78 vacancies to the direct recruit irrespective of requirement of the statutory requirement rule and quota rule.

6.2 The arbitrariness of the respondent State is further manifest from the fact that while the waiting list was operative, the Government in fact filled up the GAS Class I post by further 79 promotions in still further excess of the quota of promotees thereby accentuating the deficit of direct recruit. Having acted in such gross arbitrary manner, it is too much for the respondent State to state that this court cannot require that the Government should act in accordance with law i.e. in respect of mandatory statutory quota rule and give relief to the petitioners, who were wrongfully denied the appointment and consequential seniority.

6.3 It is further submitted that out of two remaining petitioners, the question of appointment is only qua petitioner No. 3, Shri Hitesh Oza and the question of seniority and question of deemed date of seniority for petitioner No. 3 and petitioner No. 6 only. Petitioner No. 6 Shri Shailesh Shah is already appointed to GAS Class I by promotion, as he was already in the lower post in the Government Service. So the relief is to be confined to these two petitioners.

CONCLUSION:

7. I have considered the contentions raised by the learned counsel for the petitioner. I have also considered Rule 3, 4, 5 and also interim order passed by this court. I have considered the judgements of the Hon'ble Supreme Court in the cases of STATE OF U.P. VS. RAMSWAROOP SAROJ (supra), GUJARAT STATE DY. EXECUTIVE ENGINEERS' ASSOCIATION VS. STATE OF GUJARAT AND OTHERS (supra), and the Division Bench judgement of this court in the case of COMMISSIONER OF POLICE, AHMEDABAD VS. SANTOSH MALI AND OTHERS (supra).

7.1 I have also considered the submissions raised by the learned Advocate General, Mr. S.N. Shelat on behalf of the State of Gujarat. I have also considered the affidavit in reply filed on behalf of the State of Gujarat. I have further considered the order passed by the Committee dated 27.11.1999 after this court directed to pass the order. I have also considered the judgement in the case of PRE SINGH AND OTHERS VS. HARYANA STATE ELECTRICITY BOARD AND OTHERS (supra), SURINDER SINGH & ORS. VS. STATE OF PUNJAB & ANR. (supra), THE STATE OF HARYANA VS. SUBASH CHANDER MARWAHA AND OTHERS (supra), T.N. ADMINISTRATIVE SERVICE OFFICERS ASSN. VS. UNION OF INDIA (supra), NILANGSHU BHASAN BASU VS. DEB K. SINHA & ORS. (supra), SURAJ PRAKASH GUPTA VS. STATE OF JAMMU & KASHMIR (supra), SANJOY BHATTARJEE VS. UNION OF INDIA (supra), N. MOHANAN VS. STATE OF KERALA (supra), JAYAMOHAN VS. STATE OF KERALA (supra) and GOVERNMENT OF ORISSA VS. HARAPRASAD DAS (supra).

7.2 In my view no appointment can be offered to anyone from the select list or waiting list more than the posts advertised. In this case 78 posts have been filled in from both the lists. As the petitioners are lower in rank, they are not entitled to any appointment. No appointment can be given without the posts being advertised. Equal opportunity is required to be given to all. The advertisement was limited to 78 posts only. Therefore, even if there were more posts than 78, fresh

advertisement has to be issued. 78 vacancies were determined when the requisitions were submitted. It was only when seniority list was finalised and representations were invited that it was noticed that more vacancies were available. These vacancies have been subsequently advertised and the petitioners could have availed of the opportunity.

7.2A Though the vacancies of the posts as on 31.12.1984 was 147, advertisement was issued only for 83 / 78 posts. The petitioners cannot seek appointment to the existing vacancies on the date of advertisement which were not advertised. The same is not violative of fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India.

7.2B In service jurisprudence even when there is vacancy the State is not bound to fill up such vacancy, nor is there any corresponding right vested in an eligible employee to demand that such post be filled up.

7.2C In the instant case, 78 vacancies in GAS Class I were advertised by the Gujarat Public Service Commission on the basis of requisitions for the years 1983-84, 1984-85 and 1985-86 sent by the Government and 8 (eight) candidates out of 78 candidates of the main merit list did not join in GAS Class I. Therefore, the Government had filled up those 8 (eight) vacancies by operating the waiting list. The waiting list cannot be used as an alternative to the requisitions for the subsequent years.

7.2D Both the select list and the waiting list stood exhausted when all the vacancies advertised were filled in 1990. Interim order continuing the waiting list has no effect because the vacancies advertised have been filled in. The waiting list cannot be operated for the vacancies not advertised. The petitioners have no legal, enforceable right to claim appointment in respect of the posts which were not advertised.

7.2E In my view the Government can advertise and invite application for certain posts. The posts can be requisitioned in lesser number than the existing vacancies. The decision to fill up vacancy or not vests with the employer-Government who for good reasons, be it administrative, economical or policy, decide not to fill up such posts. Whether to fill up a vacancy is a question falling within the purview of the executive. It is the administrative function of the appointing authority to take a decision as to which method should be

adopted for recruitment on any particular post.

7.3A The fact is that after June 1990 the State Government has by direct recruitment, filled up several posts which have been shown by the respondents in this behalf. In view of this, the petitioners had ample opportunity to compete in each one of the posts advertised and appear at the examinations. The petitioners are not entitled to relief in the present petition on the basis of their being selected on the waiting list when the posts advertised have already been filled in. In view of the subsequent advertisement, the petitioners are not entitled to any relief in this behalf. The court cannot grant an order of appointment merely because the petitioners have been empaneled in the waiting list.

7.3B Reading of Rules 4 and 5 would show that the rules apply only for the fixation of quota for the purpose of seniority and not for the purpose of appointment. No legal, enforceable right flows from Rule 5. The Rules only provide that when two promotions are effected, one post is to be made available to the direct recruit. Therefore, the ratio laid down in Rule 5 has to be reflected in the seniority list. The direct recruits have no right to claim seniority from the date of vacancies. Direct recruits can claim seniority from the date of appointment only. No enforceable legal rights flow from Rule 5 that a mandamus be issued against the State Government for appointing the petitioners from the waiting list.

7.3C This court has no jurisdiction to interfere with the matter of policy of the State Government in connection as to how many posts are to be advertised and how many posts are to be filled in.

7.3D The judgements cited by the learned counsel for the respondents support the contention raised by the learned counsel for the respondents. Therefore, the contentions raised by the learned counsel for the respondents are required to be accepted. The learned counsel for the petitioners has raised several contentions and also cited several authorities in this behalf. The contentions raised by the learned counsel for the respondents completely answer the contentions raised by the learned counsel for the petitioners. Therefore, this petition is required to be rejected.

7.4 In my view the High Court under Article 226 of the Constitution cannot interfere and decide as to how

many posts are required to be advertised. The High Court cannot direct the Government to appoint the direct recruits from the waiting list prepared in 1980 in the vacancy which according to the High Court should have been available as that would amount to interfering with discretion of the Government which as a matter of policy may decide to fill lesser vacancies.

7.5 In my view no person above the petitioners in the rank has been offered appointment from the waiting list.

8. In the result this petition is rejected. No order as to costs.

(K.M. MEHTA, J)
(pkn)

After pronouncement of the judgement today i.e. on 16.3.2002, the learned counsel for the petitioners Mr. A.M. Raval requests that this court may extend the interim relief which was granted earlier by this court on 30.9.1990 and continued till date, for some more time. In the facts and circumstances of the case, it is directed that the respondents are directed not to fill up the posts of Gujarat Administrative Service Class I and it is directed that the select list produced at Annexure-A shall not be deemed to have been lapsed till 5.4.2002.

Date: 16.3.2002 (K.M. MEHTA, J)